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Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy

Judy Fudge*

This paper identifies the limitations that inhere in the conventional Canadian approach of using labour law to challenge women's subordination within the labour market. To do so, it draws upon my previous writing on the legal regulation of women's employment. My overarching research concern is to understand labour law's relationship to labour market inequality. I have used women workers as a focal point because historically they have been, and continue to be, located at the bottom of the labour market.¹ While ascribed characteristics other than sex, such as race, ability, and aboriginal status influence a worker's position in the labour market, it is women with these characteristics who are situated at the bottom.² Nonetheless, it is important

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¹ This paper draws upon my previous work in this area: "Gender Issues in Arbitration: An Academic Perspective" in W. Kaplan, J. Sack & M. Gunderson, eds., *Labour Arbitration Yearbook 1991*, vol. 1 (Toronto: Butterworths, 1991) 119; *Labour Law's Little Sister: The Employment Standards Act and the Feminization of Labour* (Ottawa: Canadian Center for Policy Alternatives, 1991); with P. McDermott, eds., *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto Press, 1991); "The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-based Bargaining" in L. Briskin & P. McDermott, eds., *Women Challenging Unions: Feminism, Democracy, and Militancy* (Toronto: University of Toronto Press, 1993) 231; with E. Tucker, "Reproductive Hazards in the Workplace: Legal Issues of Regulation, Enforcement, and Redress" in *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood*, vol. 4, Research Studies of the Royal Commission on New Reproductive Technologies (Ottawa: Ministry of Supply and Services, 1993) 161; "Fragmentation and Feminization: The Challenge of Equity for Labour-Relations Policy" in J. Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 57; with H. Glasbeek, "The Legacy of PC 1003" (1995) 3 Can. Lab. & Emp. L.J. 357.

² See the studies and findings discussed in T.D. Gupta, *Racism and Paid Work* (Toronto: Garamond, 1996) at 7-8; P.J. Poole & J. Rebeck, "Not Another Hundred Years: The Failure of the Federal Employment Equity Act" (1993) 1 Can. Lab. L.J. 341.

to recognize that although all women tend to experience systemic disadvantages in the labour market as compared to men, sex discrimination may be compounded by other forms of systemic discrimination with the result that not all women are treated the same.³ By focusing on how labour law treats women workers, I do not mean to suggest that only women workers have valid claims for improvements in their terms and conditions of employment. Far from it. If my analysis of labour law's treatment of women employees has any value, it may have implications for understanding and evaluating the law's response to other forms of systemic discrimination in employment. My general argument is that, rather than challenging employment inequality, labour law reproduces and reinforces it. Moreover, this is becoming increasingly evident in the current economic context.⁴

At the outset, I shall define some of the terms I will be using in this discussion. The first is "labour law". Since I am concerned with understanding how regulation ameliorates, mediates, and reinforces labour market inequality, a broad definition of labour law is adopted. I use "labour" to denote a specific subject area of regulation and "law" to encompass a variety of different legal forms. Labour law refers to the regulation of terms and conditions of employment. Such regulation may be direct, in that it imposes

3 One of the problems with addressing systemic discrimination in the workplace and the labour market is that Canadian human rights legislation generally iterates a number of discrete, prohibited grounds of discrimination into which the complainant must place herself or himself. This causes real difficulties for complainants who allege multiple grounds of discrimination and it results in an additive approach to discrimination at best, or to ignoring certain forms of discrimination at worst. According to Nitya Duclos, "The most fundamental error in current antidiscrimination doctrine [under human rights legislation] lies in its location of difference in the individual complainant rather than in his or her relationship with others. It treats difference as an intrinsic characteristic of the individual—the discrimination is due to his or her race or sex—rather than as arising out of the relationship between that individual and others." Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25 at 47 [footnote omitted, emphasis in the original].

4 It is well-established that the process of economic and political restructuring, which invokes the inevitability of global competition to justify a shift of power from the democratically accountable public sphere to the private realm of market relations and the narrow calculus of economic self-interest, has resulted in a deterioration in the working conditions and wages of the majority of Canadian workers. See, for example, P. Armstrong, "The Feminization of the Labour Force: Harmonizing Down in a Global Economy" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) 29; D. Broad, "Globalization and the Casual Labour Problem: History and Prospects" (1995) 22 Social Justice; D. Broad, "Global Economic Restructuring and the (Re)Casualization of Labour in the Centre: with Canadian Illustrations" (1991) 14 Review (Fernand Braudel Center) 555. There is also a growing body of Canadian literature that examines the gendered nature of the restructuring process. See I. Bakker, ed., *The Strategic Silence: Gender and Economic Policy* (London: Zed Books, 1994); J. Brodie, *Politics on the Margins: Restructuring and the Canadian Women's Movement* (Halifax: Fernwood Press, 1995); I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996).

minimum terms and conditions or prohibits terms and conditions that are discriminatory, or indirect, by providing access to collective bargaining. Moreover, law not only refers to legislation, but also includes both the interpretation and application of such legislation by administrators, statutory adjudicators, grievance arbitrators, and the courts. While in theory it is possible to distinguish legislation, administration, and jurisprudence, in practice these different legal forms operate together to regulate employment within the Canadian labour market.

The next two terms that need to be defined are “sex” and “gender”. Sex refers to the biological differences between men and women. Gender, in contrast, refers to the social significance attributed to sexual difference. Later in the paper, I argue that it is important to distinguish between these terms, rather than use them interchangeably. Gender is employed as an analytical concept to understand social relations, while sex is used as a descriptive category that refers to biological men and women.

This paper is organized into four linked sections. First, I will argue that labour law’s traditional focus on women’s distinctive sexual and reproductive characteristics both obscures how women’s subordination is reproduced and treats men as the standard against which women are judged. Second, I will illustrate how the traditional approach to conceptualizing women’s unequal labour market position has resulted in a series of legislative strategies that, although they were designed to ameliorate some of the worst abuses experienced by women employees, have done little to challenge the underlying inequality of the labour market. By focusing on women workers’ distinctive attributes, legislation has either been designed to respond to women’s different needs or to neutralize these differences. This sameness/difference framework is not sufficiently attentive to the dynamic structure of inequality that permeates the employment relationship. Third, I will indicate why gender is a more useful analytic concept than sex, which is purely descriptive, for understanding women’s labour market position. Fourth, I will argue that labour law, which includes collective bargaining, employment standards, human rights, and other equity laws and their interpretation and application, is gendered and that it reinforces the hierarchical structure of the labour market in Canada. Labour law is organized as a ladder, with those at the top of the labour market enjoying certain legislative regimes, while those at the bottom are forced to rely on other less adequate forms of regulation. Where a worker is situated in the labour market will largely determine what kinds of remedies labour law can offer. I will conclude by briefly suggesting the ways in which labour law can be reconceived to challenge inequality in an increasingly polarized labour market.

I. THE PROBLEM WITH FOCUSING ON WOMEN'S SEX

If you look at any standard casebook or textbook on Canadian labour law, the starting assumption appears to be a sexless worker.⁵ But, upon closer examination, sex is irrelevant only so long as there is an all male cast. Men's sex is invisible because it is regarded as the norm, and hence unproblematic. Sex becomes an issue when the worker is a woman. One effect of this starting assumption is that women workers figure in labour law in a peculiar sort of way—a way that is intimately tied to their sexual characteristics. The standard worker remains sexless until specific problems, seen as exclusively those of women workers, arise. But because labour law responds to what are conceptualized as problems relating exclusively to women's sexual characteristics, the definition of a standard worker, a male, is not challenged. Indeed, it is reinforced.⁶

In a standard labour casebook or textbook, women figure under certain headings such as reproductive hazards, maternity leave and benefits, equal pay for equal work, affirmative action, and sexual harassment. Labour law responds to the problems that arise from women's sex at work in two general ways. On the one hand, women are given special treatment or protection because of their unique reproductive capacities. On the other hand, women are treated the same as men to counteract sex discrimination in employment.

Two examples can be used to illustrate this contradiction. The first is how labour law responds to the problem posed by women's reproductive

⁵ See, for example, the leading labour law casebook in Canada: Labour Law Casebook Group, *Labour Law: Cases, Materials and Commentary*, 5th ed. (Kingston: Industrial Relations Press, Queen's University, 1991). Here, a *mea culpa* is in order. As a member of the Casebook Group for the fifth edition, I attempted to insert gender into the conceptual framework of the materials, albeit implicitly, in order to illuminate the fact that the standard worker is assumed to be male (see the Introduction and Chapter twelve on Employment Standards Legislation). This limited attempt was not successful. In fact, because the conceptual framework was not explicit, the technique I adopted tended to reinforce the assumption that the standard worker is male. In the casebook, sex segregation in the labour market is identified as a problem in employment only to the extent that women workers are explicitly being discussed. It is not treated as a defining feature of the labour market. One of the implications of the argument presented in this paper is that an analysis of labour law that is attentive to gender would lead to a wholesale revision of the pedagogic treatment of labour law. For leading labour law texts in which the position of women in the labour market is rarely mentioned, see G.W. Adams, *Canadian Labour Law*, 2d ed. (Aurora: Canada Law Book, 1995) and H.W. Arthurs et al., *Labour Law and Industrial Relations In Canada* (Toronto: Butterworths, 1993).

Although there are no similar articles in Canada, in both England and Australia some preliminary attempts have been made to disclose the gendered nature of the traditional approach to labour law. See J. Conaghan, "The Invisibility of Women in Labour Law: Gender-neutrality in Model-building" (1986) 14 Int'l. J. Soc. L. 337 and R. Hunter, "Representing Gender in Legal Analysis" (1991) 18 Melbourne Univ. L.R. 505.

⁶ One of the reasons for using the concept of gender rather than sex is that it reveals how the norm of labour law is male-biased.

capacity to bear children.⁷ Early health and safety legislation in Canada singled out women and children for special protection. Such legislation focused on the possible adverse effects of work on women's health, offspring, mortality, and morality. Women were protected primarily as mothers, not as workers.⁸ However, as Veronica Strong-Boag points out, "most such legislation acknowledged female inferiority much more than it aimed at its elimination."⁹ Gillian Creese also points out that "[p]rotective legislation was premised on women's subordinate positions within the family, the economy and civil society."¹⁰ Moreover, legislative protection of women operated in the context of employers who had, for a long time, excluded women from predominantly male jobs on the basis of biological differences. Such exclusion was initially justified on the ground that women's anatomy, and specifically their reproductive capacity, was vulnerable to injury. Legislation that began to remove women's employment barriers was introduced in the 1950s, although the progress of legislative equality was uneven.¹¹

While restrictive legislation is generally a thing of the past in Canada, the theme of protection for women workers has not disappeared. In its place,

7 The discussion of reproductive hazards is drawn from Fudge & Tucker, "Reproductive Hazards in the Workplace" *supra* note 1. See S.J. Kenney, *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain* (Ann Arbor: University of Michigan Press, 1992) for a discussion of the legal regulation of reproductive hazards in the workplace in other jurisdictions.

8 E. Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850-1914* (Toronto: University of Toronto Press, 1990) at 82-96; N.M. Chénier, *Reproductive Hazards at Work: Men, Women and the Fertility Gamble* (Ottawa: Canadian Advisory Council on the Status of Women, 1982) at 39. It is interesting to note that although the political impetus behind the first factory legislation in Ontario was to protect women and children from the ravages of industrial capitalism, women's organizations were not involved in the campaign, although the legislation had broad support. In Ontario during the early 1880s, women's organizations such as the Women's Christian Temperance Union did not actively pursue the issue of women's occupational health and safety. It was not until the next decade that women's paid work became a prominent issue on the agenda of middle-class women's reform organizations. While the endorsement of protective legislation for women workers was not universal within the women's reform community, it was dominant. The majority of women reformers and their organizations embraced the prevailing ideology that women's proper place was in the home and not in the workplace. In her study of protective legislation for women workers in the 1880s and 1890s, Constance Backhouse concludes that "it focused on women primarily as sexual objects and only secondarily as workers." Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991) at 292.

9 V. Strong-Boag, "The Girl of the New Day: Canadian Working Women in the 1920s" (1979) 4 *Labour/Le Travailleur* 131 at 158.

10 G. Creese, "Sexual Equality and the Minimum Wage in British Columbia" (1991) 26 *J. Can. Studies* 120 at 122.

11 J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 246.

a new form of protectionism has surfaced, whereby individual industries and employers have expressed concern for women's reproductive capacity and the health and safety of fetuses; however, instead of preventing or minimizing the risk to women and fetuses by excluding the hazard, the typical corporate and, on occasion, public regulatory response has been to exclude fertile women.¹²

These sex-specific policies have raised a number of problems to which labour law has had to respond. At the most general level, the challenge posed to labour law is one of balancing occupational health and safety concerns for pregnant women and their fetuses against the rights of women of child-bearing age to equal treatment and opportunity in employment. The balance that labour law seeks to strike is subject to competing tugs and pulls. At the same time as some women are using human rights legislation to challenge policies that exclude them from certain activities because of the apprehended danger to fetuses,¹³ other women are deploying occupational health and safety legislation to bolster their rights to refuse to work in situations that are potentially dangerous to their own health or the health of their fetuses.¹⁴ The dilemma that labour law faces is balancing equality for women and men in employment against concerns for the reproductive health of women employees.

Where labour law draws the line between safety and human rights depends upon the scope of the exclusion or protection policy, the evidence of potential harm, and the options available to the employer both to protect the fetus and to operate its business in a profitable or productive manner.¹⁵ What labour law rarely questions are two basic assumptions: 1) that the conflict between safety and equality is identified as one that is embodied in the competing aspirations of women workers to be employed in jobs that pay decent wages while simultaneously bearing healthy children; and 2) that women are exclusively involved in reproduction. I shall refer to these assumptions as the myth of the disappearing employer and the myth of immaculate conception respectively.

In the first myth, the employer's responsibility for creating the hazard through his or her control over the labour process disappears; instead, the employer's role is refashioned as that of the protector of the fetus from the employment choices of the woman worker. Fetuses are regarded as hyper-

¹² Fudge & Tucker, "Reproductive Hazards in the Workplace", *supra* note 1 at 162.

¹³ *Ibid.* at 266-70.

¹⁴ *Ibid.* at 179-81; *Canada Labour Code*, R.S.C. 1985, c. L-2, Part III, Division VII.

¹⁵ Fudge & Tucker, *ibid.* at 266-70 and 271-77.

susceptible to harm from substances that are often found in workplaces. In justifying protective policies for fetuses, employers point to their general concern for the health of the next generation and their desire to avoid potential liability for fetal damage. Unlike workers, the vast majority of whom are covered by workers' compensation legislation, children who are harmed by prenatal exposure to workplace hazards can bring civil actions.¹⁶ The emphasis is on the individual woman's employment choice that poses a threat to fetal health, rather than on the employer's production decisions that give rise to hazards and create conflicts between fetal health and women's employment rights in the first place.

Joined with the concern about fetal vulnerability is the belief that hazards are transmitted primarily through the woman's body. According to the myth of immaculate conception, men's contribution to conception is ignored, despite accumulated evidence that men workers are subject to occupational hazards that detrimentally impact on their reproductive choices and may influence fetal health and viability.¹⁷

These assumptions, or myths, lead to a number of pernicious consequences. First, employers' prerogatives over production decisions, how to organize work, and what processes to use are not challenged unless they are proven to be unsafe for their workers. There is little pre-screening of the health and safety consequences of production decisions, with the result that workers are turned into guinea pigs. Despite the existence of occupational health and safety legislation that provides workers with the right to participate on joint employer/employee health and safety committees, these rights of participation have done little to shift the balance of power when it comes to the employer's ability to implement production decisions that may have detrimental consequences on the health of the workforce.¹⁸ Once potential hazards are identified, the typical response is to develop ameliorative mechanisms to deal with the problem, such as excluding women of childbearing age rather than dealing with the hazard at the source. Second, because the focus is on reproductive hazards to women, when women perform what has conventionally been characterized as men's work, there is little

¹⁶ *Ibid.* at 251-54.

¹⁷ *Ibid.* at 258, 270, and 285.

¹⁸ Collective bargaining plays a large role in influencing the effectiveness of occupational health and safety legislation. See R. Brown, "Unions, Markets and Other Regulatory Mechanisms: Theory and Evidence" (1994) 44 U.T.L.J. 38. For a critical assessment of the most recent wave of occupational health and safety reform see E. Tucker, "And Defeat Goes On: An Assessment of Third Wave Health and Safety Regulation" in F. Pearce & L. Snider, eds., *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press, 1995) 245.

attention paid to reproductive hazards that occur in female-dominated workplaces. Exclusionary policies for women of childbearing age are predominate in heavy manufacturing and resource extraction industries that are dominated by men, not in hospitals, office buildings, or in the service sector where women are typically employed.¹⁹ Third, the reproductive hazards to which male workers are exposed are, generally, simply ignored. And on the few occasions when reproductive hazards in the workplace for men have been acknowledged, the response has been quite different. Rather than excluding men, the harmful substances were banned.²⁰ Fourth, women who seek to protect their own reproductive health and the health of their fetuses are regarded by employers as increased costs they could otherwise avoid by hiring men or non-fertile female workers.

By focusing on women's reproductive capacities and ignoring men's, labour law both jeopardizes women's employment equality and men's reproductive health. This traditional response also ignores the employer's responsibility in creating the hazards. If labour law was concerned about equality between men and women in employment and the total health of all workers, it would require employers to consider and minimize potential health and safety hazards before implementing any decisions on how to organize production and services.

The second example of the contradiction apparent in labour law's treatment of women's sex at work is how it responds to sexual harassment in the workplace. Although there is some early case law emanating from Saskatchewan that characterizes what would now be considered sexual harassment as a grounds for termination of employment at common law,²¹ two decades ago, sexual harassment did not have a name. It was simply a normal and inevitable activity of men when exposed to contact with female co-workers.²² But gradually human rights legislation, which prohibited discrimination on the basis of sex, was expanded to make this behaviour illegitimate. The central problem was defining what sorts of activities constituted sexual harassment. Unwanted sexual interaction that is made a condition of hiring, continuing in a job, or getting a promotion at the workplace was the first form of activity that fell foul of anti-discrimination

¹⁹ Fudge & Tucker, "Reproductive Hazards in the Workplace", *supra* note 1 at 258.

²⁰ *Ibid.* at 270.

²¹ *Chow v. Paragon Cafe*, [1942] 1 W.W.R. 519 (Sask. Q.B.).

²² F. Faraday, "Dealing With Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse" (1994) 32 Osgoode Hall L.J. 33 at 37. See also C. Backhouse & L. Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan, 1978) c. 3.

law. Later, the prohibition was expanded beyond this type of *quid pro quo* harassment to include continued verbal, physical, or psychological harassment, otherwise known as hostile-environment harassment.²³ Moreover, the response of human rights legislation and jurisprudence to the problem of sexual harassment has influenced both the negotiation of terms addressing this issue in collective agreements and their interpretation by arbitrators. This has provided unionized workers with a choice of raising complaints of sexual harassment either before a human rights commission or, via the grievance process, before an arbitrator.²⁴

Although the formal definition of what constitutes sexual harassment has expanded, two vexatious problems continue to plague this area of labour law; first, when is harassment sexual? and second, what is the standard of unacceptable conduct or behaviour?²⁵ Both human rights adjudicators and collective agreement arbitrators must, at least implicitly, address these questions when deciding a complaint involving sexual harassment. In delineating behaviour that does not constitute sexual harassment, one arbitrator asserted:

The problems [in the particular workplace] may have resulted in part from the sexist structure of our society, where men are usually the bosses and women are the subordinates, even though the woman in many work relationships may have more intelligence than her supervisor. This can create problems when his authority is challenged, as here (although a woman supervisor might well have reacted in the same way to provocations to authority). But the male supervisor's responses or anger cannot be immediately characterized as sexual harassment, nor can the structures of the workplace be changed through arbitration.²⁶

By requiring the harassment to be explicitly sexual in nature, human rights adjudicators and grievance arbitrators ignore the fact that many more men

²³ Faraday, *ibid.*; A.P. Aggarwal, *Sexual Harassment in the Workplace*, 2d ed. (Toronto: Butterworths, 1992).

²⁴ For a discussion of arbitral jurisprudence on sexual harassment and the influence of human rights legislation see M. Cornish & S. Lopez, "Changing the Workplace Culture Through Effective Harassment Remedies" (1995) 3 Can. Lab. & Emp. L.J. 95 at 113-26.

²⁵ Fudge, "Gender Issues in Arbitration", *supra* note 1; Faraday, *supra* note 22.

²⁶ Arbitrator Swinton in *Re C.U.P.E. and O.P.E.I.U., Local 491* (1982), 4 L.A.C. (3d) 385 at 408. Contrast this with *Re Canada Post Corp. and C.U.P.W.* (1987), 27 L.A.C. 27 at 43-44, discussed *infra*, where a distinction between sexual harassment aimed at an employee's sexuality and sexual harassment aimed at an employee's gender was drawn but not developed.

manage and supervise women than *vice versa*.²⁷ What is conventionally understood as acceptable behaviour on the part of bosses is in fact masculine behaviour. That men traditionally have been located on higher rungs of the occupational ladder than women contributes in part to women's subordination in the workplace.²⁸ Simply because such subordination may be expressed as a mix of arrogance and paternalism rather than explicitly sexual behaviour, does not mean either that women are being treated with equal respect at work or that the treatment is not gendered.²⁹ Yet, sexual harassment legislation cannot deal with these forms of subordination. What human rights legislation and collective agreements can do, however, is provide recourse for individual women who have experienced conduct that is explicitly sexual in nature.³⁰

The problem with requiring sexual harassment to be explicitly sexual in nature is compounded by the requirement that the complained of activity or behaviour must fall short of the standard of socially acceptable behaviour. What is socially acceptable behaviour? The assumptions that infuse this standard are visible in a grievance arbitration case involving Canada Post and the Canadian Union of Postal Workers.³¹ In this case, a woman had become the first permanent female employee at a Canada Post loading dock. When she complained of primarily verbal sexual harassment, her harasser was fired and the union subsequently grieved the dismissal. The arbitrator found:

In this essentially male atmosphere, an ethos not unlike that of the proverbial locker-room appears to have developed. The work often involves heavy physical labour, and the employees tend to converse in a correspondingly rough fashion. There is a good deal of generally insulting comment, more or less good-natured, as well as stories, jokes and comments of an explicitly sexual nature, all punctuated by the regular use of obscene and blasphemous language. The female employee testified that she had been led to expect this kind of atmosphere, and that she had been told by

27 M. Boyd, M.A. Mulvihill & J. Myles, "Gender, Power and Post-Industrialism" (1991) 28 Can. Rev. of Soc. and Anth. 407 at 428.

28 J. Acker, "Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations" (1990) 4:2 Gender & Society 130.

29 For a discussion of how, and the extent to which, paternalistic behaviour is gendered see J. Lown, "Not So Much a Factory, More a Form of Patriarchy: Gender and Class During Industrialization" in E. Gamarnikow et al., eds., *Gender, Class and Work* (London: Heinemann, 1983) 28 at 33-36.

30 See C. Sheppard, "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment" (1995) 3 Can. Lab. & Emp. L.J. 249 for a critique of the individualized approach of existing remedies for sexual harassment.

31 *Re Canada Post Corp.*, *supra* note 26.

fellow employees that if she wanted to work on the dock she would simply have to put up with it.³²

This statement typifies the uncritical assumption that existing conditions in the workplace are sex-neutral.³³ It also assumes that standards of behaviour in male-dominated workplaces are acceptable. It is no wonder that men do not understand sexual harassment complaints made by women when they treat each other so badly. The proverbial locker room is simply a shorthand for what is acceptable behaviour in certain types of male-dominated workplaces. The fact that heavy labour was involved in the Canada Post case is irrelevant; rarely does one see evidence of such demeaning shenanigans in hospitals or day cares where primarily women are employed to perform demanding physical labour.

Increasingly, the right of individual women to challenge the norms of offensive behaviour in male-dominated workplaces is being recognized by human rights adjudicators. Even when the offensive conduct falls within the standard of socially acceptable behaviour for a particular workplace, a legal remedy may be available to women who complain about specific conduct if that behaviour would be considered offensive outside that workplace. But, as Arjun P. Aggarwal points out, "basically the responsibility lies with the offended person to express her disapproval of such an environment and make the perpetrators of such behaviour aware that their conduct is personally offensive."³⁴ Thus, the onus is on the woman to express her 'personal view' of what she finds acceptable rather than on the employer to ensure that the workplace is a respectful environment to women. Women who have the courage to initiate such complaints may gradually succeed in raising the benchmark of socially acceptable behaviour in male-dominated workplaces. There is some evidence that women's concerns for equality and dignity in the workplace are gradually infiltrating Canadian human rights jurisprudence.³⁵ But to date, with rare exceptions, adjudicators have been reticent directly to challenge workplace norms that have been historically acceptable to men.³⁶

³² *Ibid.* at 29.

³³ Faraday, *supra* note 22 at 53; Aggarwal, *supra* note 23 at 89-96.

³⁴ Aggarwal, *ibid.* at 94.

³⁵ *Ibid.* at 94-96.

³⁶ There is some indication that this may be changing. In *Carr v. Allison Gas Turbine Div., G.M.*, 32 F.3rd 1007 (7th Cir. 1994) Judge Posner did not accept GM's defense that the complainant's tinsmith co-workers, employed in what had historically been a male-dominated workplace and occupation, had simply engaged in "shop talk" by directing sexually explicit and profane language at her. I would like to thank Professor Ken Norman for bringing this case to my attention.

The allegedly sex-neutral standard of socially acceptable behaviour simply makes the male workplace culture the standard against which equality is measured. So long as women are treated no worse than men treat each other, there is no legal problem nor a legal remedy unless an individual woman complains. And even then, there is no guarantee that the behaviour will be considered sexual harassment. What the traditional labour law response to sexual harassment ignores is that harassment of women workers may not be explicitly sexual and that no worker, whether male or female, should be subjected to demeaning behaviour in the workplace. Labour law does not challenge subordination in the workplace *per se*, it simply prohibits invidious forms of subordination on enumerated grounds.

II. THE STAGES OF LABOUR LAW: PROTECTION, EQUAL RIGHTS, AND AFFIRMATIVE ACTION

What these examples illustrate are the perils of protection, on the one hand, and the limitations of a human rights approach to equality, on the other. All too often protective legislation that is designed to accommodate women's reproductive capacities and child-rearing responsibilities stress women's roles as mothers at the expense of their need to earn an adequate living for themselves, their children, and other dependents. By contrast, an equal rights' approach that treats men and women workers in the same way ignores the fact that most women have to balance domestic duties when undertaking employment. Feminist scholars have characterized this as the sameness/difference dilemma. But according to the editors of a recent collection of essays on protective legislation, this "euphonious phrase belies the hard choices that women must make when they choose between social policies that emphasize their differences from men and those that insist that men and women be treated as alike for workplace purposes. These choices are often blurred."³⁷

The problem with protective legislation that takes women's sexual difference as its starting place is that it reinforces the male standard worker, contributes to women's ghettoization in certain occupations and industries, increases the costs of employing women, and ignores other bases of inequality in the workplace that ought to be challenged.³⁸ These problems not only inhere in the traditional policies designed to deal with reproductive hazards in the workplace, they also distort labour law's response to pregnant women

³⁷ U. Wikander, A. Kessler-Harris & J. Lewis, "Introduction" in U. Wikander, A. Kessler-Harris & J. Lewis, eds., *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920* (Urbana and Chicago: University of Illinois, 1995) 1 at 2.

³⁸ See generally, *ibid.*

who not only want time off work in order to have children and to care for infants but also want a source of income while doing so. Currently, Canadian legislation that provides both maternity leave and benefits is designed so that only higher paid women can take advantage of it.³⁹ The low level of benefits and the restrictive conditions for eligibility ensure that low paid women, who often work in part-time and temporary jobs, simply cannot take the time off to which they are legally entitled because they cannot afford to do so. In fact, there is a direct correlation between low take-up rates for maternity and parental benefits and low wages for women workers. Not only does the design of maternity and parental benefits disadvantage those women workers who are already at the bottom of the labour market, it also increases the costs of employing all women. Moreover, protective legislation that focuses on women's sex does not address the fact that women themselves occupy different positions in the labour market hierarchy and, as a consequence, have unequal access to the benefits of legislative protection.

Similarly, the traditional human rights approach to dealing with sex discrimination does little to address pervasive inequality in the labour market. This is because it assumes two things: first, discrimination *per se* is unimpeachable and in fact it is often valuable; second, only certain forms of invidious discrimination should be prohibited. Human rights legislation does not prohibit all forms of discrimination in employment; it only prohibits discrimination on enumerated grounds such as sex and race, which are ineluctable characteristics that historically have been associated with unequal treatment.⁴⁰ It is perfectly legal for an employer to pay someone lower wages if she has fewer qualifications than other employees.⁴¹ However, it is illegal for an employer to pay a woman less than a man to do a job of the same, similar, or equal value.

Because men and women are most often employed in different jobs, any attempt to ensure that women are paid the same for jobs that are equal in value requires employers to engage in a complex exercise of revaluing men's and women's work using sex-neutral criteria. This is the thrust of both proactive pay equity and complaint-based equal pay for work of equal value

³⁹ This is so despite the fact that the maternity leave benefits under the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, as rep. by *Employment Insurance Act*, S.C. 1996, c. 23, have been repeatedly amended so as not to treat pregnant women worse than other benefit recipients and to provide sex-neutral parental benefits. See P. Evans & N. Pupo, "Parental Leave: Assessing Women's Interests" (1992) 6 C.J.W.L. 402.

⁴⁰ See, for example, the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 5; W. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Scarborough, Ontario: Carswell, 1994) c. 1 and 2.

⁴¹ M. Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Melbourne: Oxford University Press of Australia, 1990) at 18-20.

legislation.⁴² However, unequal valuations within either the class of women's or men's jobs and an overall reduction in men's wages, which is the standard against which women's pay inequality is to be measured, does not trigger a legislative remedy. In fact, it is typical for equal pay and pay equity legislation to exclude factors such as merit, skills shortages, seniority, and collective bargaining power—factors that historically have resulted in lower pay for women's work from the scope of the remedial exercise.⁴³ What this means is that women who are relatively well-situated within the labour market will do better under equal pay and pay equity legislation than the majority of women who are clustered at the bottom.⁴⁴ A well-situated woman, for example, would have professional skills, work full-time, and/or be represented by a trade union. This human rights' approach simply adopts the male standard and thus is a benefit to those women whose work is more analogous to men's.⁴⁵ It does not address pervasive inequalities between women workers (and men workers for that matter) that result in a lower standard of living and more constrained life chances.

Labour law has not remained completely ignorant of, nor untouched by, the limitations of a protective approach, on the one hand, and an equal rights' approach, on the other. The third generation of legal responses to women's inequality in the workplace has been affirmative action.⁴⁶ Unlike protection and equal rights, affirmative action has only been grudgingly and tentatively embraced by both legislatures and adjudicators. Only the federal jurisdiction and Ontario, for a very short period, have enacted affirmative action legislation, which is better known in Canada as employment equity.⁴⁷ The reason for this hesitation is in part because affirmative action strategies conflict with the liberal ideal that ascriptive characteristics should be ignored

42 See the collection of essays in Fudge & McDermott, *Just Wages*, *supra* note 1.

43 See, for example, the Ontario *Pay Equity Act*, R.S.O. 1990, c. P.7, s. 8.

44 Fudge, "Fragmentation and Feminization", *supra* note 1 at 73-77.

45 This is the case despite the fact that the Ontario *Pay Equity Act*, *supra* note 43 specifically mandated gender neutral job comparisons to redress systemic wage inequality between men and women.

46 The Abella Royal Commission Report recommended affirmative action legislation, which it called employment equity, marking the third stage in labour law's treatment of women workers: Royal Commission on Equality in Employment, *Equality in Employment* by Judge R. Abella (Ottawa: Supply and Services, 1984).

47 *Employment Equity Act*, S.C. 1984-85-86, c. 31 and *Employment Equity Act*, 1993, S.O. 1993, c. 35. Paradoxically, at the same time as the federal *Employment Equity Act* was strengthened (S.C. 1995, c. 44), the newly elected Ontario Conservative government repealed the *Employment Equity Act (Job Quotas Repeal Act, 1995, S.O. 1995, c. 4)*. In *Action Travail des Femmes v. C.N.R.* (1987), 40 D.L.R. (4th) 193 the Supreme Court of Canada affirmed the authority of the Canadian Human Rights Tribunal to order a preferential hiring policy as a remedy for past acts of sex discrimination in employment. However, despite the authority to do so, rarely do human rights adjudicators impose an affirmative action policy on an employer.

in distributing employment-related benefits and burdens unless it can be shown that an individual has been disadvantaged by her membership in a group over which she has no control. While it is possible to argue that the liberal conception of equality includes both a concern for group rights, as opposed to individual rights, and equality of outcome, instead of equality of opportunity, this conception is subsidiary rather than dominant within liberal legal regimes.⁴⁸ Since affirmative action is the exception and not the rule for redressing the legacy of discrimination in employment, it is vulnerable to attack within a liberal legal paradigm.⁴⁹

Because affirmative action policies typically impose burdens upon the most recent entrants in the competitive labour market, affecting young white men rather than older white men who have benefitted from past discriminatory employment policies, the legitimacy of affirmative action is further undermined.⁵⁰ When an increasingly competitive labour market, which generates ever fewer good jobs, is added to liberal concerns about tampering with individual rights, the backlash against employment equity is inevitable.⁵¹ The problem with the affirmative action strategy is that, although it aims at addressing economic injustice, it leaves intact the structures that generate disadvantage in the first place.⁵² It does not challenge the pyramidal shape of the labour market but changes the composition of those who are granted privileged access to the top. Thus, women and other equity seekers appear to be the recipients of special treatment and undeserved largesse.⁵³

III. FOCUSING ON GENDER RATHER THAN SEX

By focusing on women's sex, labour law not only obscures the variety of forms that women's subordination takes, it does little to challenge the

⁴⁸ For a discussion of the different meanings of equality in Canadian human rights law see K. Swinton, "Accommodating Equality in the Unionized Workplace" (1995) 33 Osgoode Hall L.J. 703 at 706-13.

⁴⁹ For a vigorous defense of affirmative action from within the liberal paradigm see M. Kinsley, "The Spoils of Victimhood: The Case Against the Case Against Affirmative Action" *The New Yorker* (27 March 1995) 62.

⁵⁰ Swinton, *supra* note 48 at 741-42.

⁵¹ Fudge, "Fragmentation and Feminization", *supra* note 1 at 82.

⁵² N. Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 *New Left Review* 68 at 85.

⁵³ The backlash against the Ontario *Employment Equity Act*, *supra* note 47, was immediate and vociferous both in the daily press and law journals. The Ontario Conservative Party capitalized on this backlash as part of its 1995 "Common Sense Revolution" electoral campaign. See, for example, "Time For a Debate on Employment Equity" *The [Toronto] Globe and Mail* (17 February 1995) A24; "Employment Inequity" *The [Toronto] Globe and Mail* (1 September 1994) A20; R. Martin, "Challenging Orthodoxy: A Critical Analysis of Racially-Based Job Quotas" (1993) 1 *Can. Labour L.J.* 409.

hierarchical organization of the labour market that created the inequality in the first place. It assumes that the sexual division of labour both between and within reproduction (the household and the family) and production (employment and the workplace) is normal and unchanging. Labour law reifies the notion that the family is properly understood as a heterosexual couple with a male breadwinner and a dependent wife and children and that this unit has the primary responsibility for sustaining itself.⁵⁴ It ignores the fact that this family/household form is of relatively recent origin (dating from the mid-nineteenth century in industrialized countries) and that it has never been universal, but only numerically dominant.⁵⁵ Households that do not easily fit within the paradigm, such as gay and lesbian units or single parents with dependent children, are either forced within it or viewed as anomalies.⁵⁶

Labour law also takes a particular form of capitalist productive relations for granted. It assumes that employment relations must be organized hierarchically on the basis of skill differentials. Labour law generally ignores the extent to which skill is socially constructed as a result of the outcomes of struggles, both between employers and workers and between different groups of workers.⁵⁷ Feminist scholars have demonstrated the extent to which the identification of skill is gendered—that women's talents, capacities, and techniques are ignored while men's are valued—and how the biased recognition of skills contributes to the creation and legitimation of a sexually divided labour market.⁵⁸

These assumptions are deeply embedded in the laws that regulate employment. Labour law pits women against men and sex against race in the competition for good, well-paying, and secure jobs. It also ignores the consequences of the economic restructuring that has accelerated in Canada

⁵⁴ For a thorough and sophisticated analysis of familial ideology, see S.A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law" (1993) 31 Osgoode Hall L.J. 589.

⁵⁵ L. Davidoff & C. Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780-1850* (Chicago: University of Chicago Press, 1987); Ursel, *supra* note 11; W. Seccombe, *A Millennium of Family Change: Feudalism to Capitalism in Northwestern Europe* (London: Verso, 1992).

⁵⁶ Gavigan, *supra* note 54.

⁵⁷ M. Barrett, *Women's Oppression Today: The Marxist/Feminist Encounter*, rev. ed. (London: Verso, 1988) at 165-71; J. Gaskell, "What Counts as Skill? Reflections on Pay Equity" in Fudge & McDermott, *Just Wages*, *supra* note 1, 141.

⁵⁸ C. Cockburn, *Brothers: Male Dominance and Technological Change* (London: Pluto Press, 1983); M. Steedman, "Skill and Gender in the Canadian Clothing Industry, 1890-1940" in C. Heron & R. Storey, eds., *On the Job: Confronting the Labour Process in Canada* (Montreal: McGill-Queen's University Press, 1986) 152; M.E. McCallum, "Separate Spheres: the Organization of Work in a Confectionary Factory: Ganong Bros., St. Stephen, New Brunswick" (1989) 24 Labour/Le Travail 69.

since the mid-1980s: the proportion of good jobs has declined as wages and employment security have been, and continue to be, eroded. Increasing numbers of people are employed in small firms that tend to pay lower wages and provide fewer benefits than do larger corporations. Union influence is declining as a growing proportion of jobs are difficult, if not impossible, to organize. Despite the fact that women are almost as likely as men to be working at paid employment, women continue to receive less pay and to be employed in female job ghettos. Wages are dropping and jobs are becoming more insecure as part-time, temporary, and precarious employment expands and the number of full-time and relatively secure jobs contracts.⁵⁹ Protective equal rights and affirmative action legislation fail to address the fact that it is competition in the labour market that enables employers to lower wages and to reduce employment security.

Sex is not the source of women's inequality; inequality results from the division of labour and competition in the labour market. What sex historically has done is provide a justification for treating women differently, and worse, than men. Labour law remedies that fasten on sex in order to improve women's employment opportunities deal with the historical manifestation of the problem while ignoring its source; *viz*, that workers *must* sell their labour power in a competitive market to subsist and that there is a sexual division of labour in which women have primary responsibility for domestic work. Moreover, sex-based remedies reify the conception of women workers as the sum of their distinctive sexual characteristics while simultaneously reinforcing the male standard.

For these reasons, it is important to use gender as an analytic concept for examining labour market inequality rather than the biological referent sex.⁶⁰ While it is true that men and women's sexual attributes differ, the concept of gender focuses attention on the way in which these minor biological differences are used both to funnel people into reproductive or productive activities and to allocate places in a competitive labour market. Gender is the social process by which significance and value is attributed to sexual difference through symbols, concepts, and institutions.⁶¹ By understanding gender in this way,

⁵⁹ Armstrong, *supra* note 4; Fudge, "Fragmentation and Feminization", *supra* note 1.

⁶⁰ See, for example, M. Barrett, *supra* note 57; J. Scott, *Gender and the Politics of History* (New York: Columbia University Press, 1988); J. Fudge, "Concepts and Theories: Understanding Women's Subordination" [unpublished].

⁶¹ Joan Scott defines gender as a constituent element of social relations based upon perceived differences between the sexes: it is expressed symbolically; gains its meaning through interpretation by normative concepts that figure in religious, educational, scientific, legal, and political doctrines; is inscribed in, and ascribed by, institutions; and is integrally related to subjectivity. Scott, "Gender: A Useful Category of Historical Analysis" (1986) 91 *Am. Historical Rev.* 1053 at 1066-70.

we can explore how the institutions of labour law reproduce and reinforce a labour market that is structured on the basis of unequal relations between men and women workers. What the concept gender does is provide an explicitly historical, relational, and dynamic understanding of how inequality in the labour market is configured, refashioned, and challenged.

IV. RUNGS ON THE LABOUR LAW LADDER

If a gendered approach to understanding labour market inequality is adopted, the focus of inquiry shifts from women's sex to the institutions of labour law. Most Canadian labour law courses and casebooks focus almost exclusively upon collective bargaining legislation and unionized workers, despite the fact that, historically, never more than half of the Canadian workforce have enjoyed the benefits of collective bargaining.⁶² While trade union representation and collective bargaining are traditionally seen as involving a legislative balance between individual choice, on the one hand, and collective association, on the other hand, in practice Canadian collective bargaining legislation skews the trade union representation in favour of certain kinds of workers, employed in certain kinds of occupations in specific sectors.⁶³

Under Canadian collective bargaining law, employees and unions cannot simply determine the bargaining constituency for the purpose of forcing an employer to recognize and bargain with the collectivity. In exchange for the legal obligation that requires employers to recognize unions for the purpose of collective bargaining, unions gave up whatever ability they had to determine their formal bargaining structures. Unions are not permitted to exercise industrial sanctions to force employers to recognize them; instead, labour relations boards were granted the exclusive authority to certify a union that represented a group of employees defined by the board as an appropriate bargaining unit. The bargaining unit defines the constituency of employees from which a union must obtain majority support in order to be certified as the exclusive bargaining agent of those employees for collective bargaining purposes. It also defines the group of employees that can engage in collective action for the purpose of collective bargaining. The certification process is

⁶² Labour Law Casebook Group, *supra* note 5. Although this casebook examines the individual employment regime and direct statutory regulation of terms and conditions of employment, over three quarters of the book is devoted to collective bargaining law, policy, and administration.

⁶³ The discussion of collective bargaining law is drawn from Fudge, "The Gendered Dimension of Labour Law", *supra* note 1. Marion Crain also examines the gendered structure of wage labour and the role of collective bargaining legislation in maintaining it. Although many of our observations are similar, we adopt a different analytic focus and different conceptions of power: M. Crain, "Feminizing Unions: Challenging the Gendered Structure of Wage Labour" (1991) 89 Michigan L.R. 1155.

controlled by the board and requires a union to sign up a majority of employees in a unit as members. Once the union has received sufficient support, it can apply to the board for certification. At that time, the board will inquire as to whether the unit of employees organized by the union is appropriate for the purpose of collective bargaining. If the board so finds, the union is certified and it can then compel the employer to meet with it for the purpose of concluding a collective agreement. During the period that the union is seeking to sign up members, employers are prohibited from engaging in a number of unfair labour practices that, by and large, cover interference with lawful trade union activity.

The bargaining unit is the basic structural feature in Canadian labour relations law. Under Canadian collective bargaining law, labour relations boards have the exclusive authority to determine the appropriate bargaining unit. Although labour relations legislation provides some guidance as to what constitutes an appropriate bargaining unit in certain situations such as craft workers or professional employees, this is the exception rather than the rule. Labour relations boards across Canada have developed well-established policies on what constitutes an appropriate bargaining unit.

In determining what constitutes an appropriate bargaining unit, labour relations boards must balance a range of complex and often competing considerations. The concept "community of interest" is applied by all boards to determine the appropriate bargaining unit. This concept covers a number of factors, including:

- (1) similarity in the scale and manner of determining earnings; in employment benefits, hours of work, and other terms and conditions of employment; in the kind of work performed; and in the qualifications, skills, and training of employees;
- (2) the frequency of contact or interchange among employees and the geographic proximity of workplaces;
- (3) continuity or integration of production processes;
- (4) common supervision and determination of labour relations policy;
- (5) relationship to the administrative organization of the employer;
- (6) history of collective bargaining;
- (7) desires of affected parties and employees; and
- (8) extent of union organization.⁶⁴

⁶⁴ Adams, *supra* note 5 at 7-4.

What is significant about these criteria is the extent to which they reflect the initial organizational and production decisions of the employer, such as where to organize production, what to produce, and the kinds of employees and skills needed in the production process. A cornerstone of bargaining unit policy as administered by labour relations boards across Canada is that mandatory collective bargaining should take place primarily on an employer by employer basis. Multi-employer bargaining units are rare. Moreover, there is a bias in most boards' policies toward designating appropriate bargaining units at the level of the workplace.⁶⁵

The standard units that have emerged from the boards' consideration of the concept of community of interest have tended to reflect the sex segregated nature of the labour market. Historically, women have been (and continue to be) over-represented in certain industries (retail as opposed to resource extraction) and certain occupations (clerical as opposed to heavy production). Since bargaining units are typically defined at the level of a single employer's workplace, rather than the enterprise as a whole, and often reflect occupational distinctions, bargaining unit determination has tended to reflect the sex segregated nature of the Canadian labour market.

In some jurisdictions, the gender bias that exists in determining the appropriate bargaining unit has been quite evident. In Ontario, for example, standard units defined by the board include a standard production unit and a standard office unit.⁶⁶ The separation of office employees from production employees, except where the office employees are located in or next to the plant, is a well-entrenched policy. Moreover, until very recently, the Ontario board had a policy of separating part-time student workers from full-time workers at the request of either the employer or the union.⁶⁷ Inside and outside municipal workers will generally be separated into different units by

⁶⁵ J.C. Anderson, "The Structure of Collective Bargaining" in J.C. Anderson & M. Gunderson, eds., *Union-Management Relations in Canada* (Don Mills: Addison-Wesley, 1982) 173; R.J. Davies, "The Structure of Collective Bargaining in Canada" in W.C. Ridell, ed., *Canadian Labour Relations* (Toronto: University of Toronto Press, 1986) 211.

⁶⁶ J. Sack & C.M. Mitchell, *Ontario Labour Relations Board Law and Practice* (Toronto: Butterworths, 1985) at 148-69.

⁶⁷ When the NDP government of Ontario amended the *Labour Relations Act* in 1993 (*Labour Relations Amendment Act, 1993*, S.O. 1993, c. 36.), one of the changes overcame the board's previous policy of separating part-time workers into their own units. With Bill 7 (now *Labour Relations Act, 1995*, S.O. 1995, c. 1), the Tory government removed the legislative changes concerning the determination of bargaining units for part-time workers and returned the legislation to the pre-1993 status quo. Despite this, in one recent certification decision the Ontario Labour Relations Board stated that it was not satisfied that assertions about the lack of community of interest between full-time and part-time employees ought to continue to be elevated to the level of a labour relations axiom: *Caressant Care Nursing Home of Canada Ltd. v. C.U.P.E. Local 2225.09*, [1996] O.L.R.B. Rep. September/October 748.

the board. Homeworkers have also been excluded from a unit of production workers employed in a factory in the garment industry. Since the majority of office, part-time, inside municipal employees, and homeworkers are women, these standard units have tended to reinforce gender divisions in collective bargaining.

Boards in other jurisdictions have not adopted the Ontario board's standard unit policies. In British Columbia, for example, since the 1970s the board has had a policy favouring the certification of a single integrated bargaining unit. Thus, it tends not to certify separate units for production and white collar work or separate units for full-time and part-time workers.⁶⁸ Moreover, between 1973 and 1984, the labour relations statute in British Columbia provided for a form of multi-employer certification whereby employers within a sector could be organized under one certification. Even in Ontario, the concept of community of interest is no longer rigidly applied. There is increased recognition on the part of labour boards that, although employees may have many different interests, not all of them will conflict. Combining 'employees' bargaining power against their employer may be a common interest that the board should consider when deciding if the proposed bargaining unit will be able to engage in viable collective bargaining.⁶⁹

The problem with this approach to bargaining unit determination is that in the case of small workplaces, which are increasing, there is no necessary correlation between a bargaining unit structure that facilitates organization and one that results in a viable collective bargaining unit; in fact, the opposite is true. Outside the construction industry, for which most jurisdictions provide a variety of forms of legislated broader-based bargaining, it is extremely difficult for small units to obtain a first collective agreement. This is because the bargaining unit may determine the success of the certification application and affect the bargaining power of the union and the point of balance it creates with that of the employer. Unless the sector is highly unionized or the workers in the unit have a monopoly over necessary skills, small units of employees simply do not have much bargaining power.

Certification procedures administered by labour relations boards have historically favoured full-time workers employed in large workplaces within the manufacturing and infrastructure sectors.⁷⁰ Because these workers are primarily male, men workers have enjoyed the greatest access to collective

⁶⁸ Adams, *supra* note 5 at 7-46.

⁶⁹ *Ibid.* at 7-5.

⁷⁰ A. Forrest, "Securing the Male Breadwinner: A Feminist Interpretation of PC 1003" in C. Gonick, P. Phillips & J. Vorst, eds., *Labour Gains, Labour Pains: 50 Years of PC 1003* (Winnipeg: Fernwood, 1995) 139.

bargaining and its concomitant benefits. By linking union organization for the purpose of collective bargaining to the worksite through the certification procedure, collective bargaining legislation and labour relations boards ensured that workers in the peripheral labour market, who were mostly women, would not benefit from unionization. Because women have historically been employed in different firms and different occupations than men, the structure of union representation and collective bargaining reflects the sex-segregated labour market.

This does not mean that women have been explicitly denied access to collective bargaining. Women's unionization increased in the late 1960s as the public sector grew and collective bargaining rights were gradually extended to the public sector.⁷¹ Moreover, the number of women in unions grew considerably in the 1980s.⁷² Between 1983 and 1991, the number of women in unions increased by 34 per cent, while in the same period the number of male union members only increased by four per cent. Between 1983 and 1991, the proportion of employed female paid workers who were unionized increased from 29 to 31 per cent. In contrast, the unionization rate of men declined from 40 to 39 per cent during the same period. Despite these shifts, women employees are less likely than their male counterparts to be unionized. In 1991, 31 per cent of all women employees were unionized, while 39 per cent of all male employees were unionized.

These recent changes in the unionization density of men and women workers is largely attributable to the shift in jobs from the goods to the service sector. From 1976 to 1992 union density in the goods sector declined from 43 to 38 per cent. This decline is largely accounted for by the drop in employment and consequent decline of unionization in manufacturing: the share of paid workers in manufacturing dropped from 22 to 16 per cent and their unionization rate dropped from 43 to 33 per cent from 1976 to 1992.⁷³ In contrast, the service sector saw major growth both in employment and unionization during the same period. The fact that women workers are highly represented in the service sector, especially in public administration, health, and education, sub-sectors that are densely unionized, has meant that unionized women workers have been sheltered relative to their male counterparts who tend to dominate the manufacturing sector.

71 J. White, *Sisters and Solidarity: Women and Unions in Canada* (Toronto: Thompson Educational Publishing, 1993) c. 2.

72 Statistics Canada: Housing, Family and Social Statistics Division, *Women in the Labour Force: Target Groups Project*, 1994 at 58.

73 D. Galarneau, "Unionized Workers" (1996) 8:1 Perspectives on Labour and Income 43 at 44.

Despite these broad shifts in the Canadian economy and labour market, workers employed either on a part-time basis or by small firms continue to be less likely to be unionized than full-time workers employed by large firms. This has detrimental consequences for the unionization rate of women employees since many more women than men work part-time or in small firms (those with under 20 employees).⁷⁴ The vast majority of women working in small firms within the highly competitive secondary or tertiary sectors are still unable to enjoy the benefits of union representation and collective bargaining. This is also the case for the vast majority of women who work at non-standard jobs—that is, jobs that are part-time, temporary, poorly paid, and insecure. The fact that the majority of women employed in the peripheral labour market and in non-standard jobs are not represented by trade unions has little to do with women's choices. Rather, the problem is existing collective bargaining legislation.⁷⁵ According to the report of the Sub-committee of Special Advisors appointed by the British Columbia Minister of Labour to review the province's labour relations law:

Existing collective bargaining models, designed for large industrial operations with full-time workforces, have great difficulty operating in [private business and personal service sectors]. Collective bargaining is only viable when there are a sufficient number of employees to justify union organizing and collective bargaining efforts. It is simply impractical and unacceptably expensive for unions to organize and negotiate collective agreements for small groups of workers if their dues cannot begin to cover the costs involved in developing separate collective agreements for each of their work sites.⁷⁶

Thus, despite the fact that collective bargaining legislation is gender-neutral on its face, it has historically assumed a standard worker in a standard employment situation. That standard worker was male, worked full-time, had a dependent family, and had a relatively secure job in a large private sector firm. Despite its extension to the public sector, Canadian collective bargaining legislation simply does not work for employees or workplaces that fall outside

⁷⁴ White, *supra* note 71 at 167-72.

⁷⁵ *Ibid.* c. 6.

⁷⁶ Ministry of Labour and Consumer Services, Sub-committee of Special Advisors, *A Report to the Honourable Moe Sihoto, Minister of Labour: Recommendations for Labour Law Reform* by J. Baigent, V. Ready & T. Roper (British Columbia: Ministry of Labour and Consumer Services, 1992) at 30.

a narrowly circumscribed norm.⁷⁷ There is a structural bias built into the legislation that militates against the extension of collective bargaining rights to workers in bad jobs—the majority of whom are women.

Employment standards legislation, like collective bargaining law, assumes a particular norm—but in this case the norm is female and subordinate, rather than male and dominant.⁷⁸ Minimum wage legislation was first directed at women and children. At the end of the World War I, minimum wages were explicitly designed to provide a woman with a subsistence living in the event that she was entirely self-supporting and without dependants. This benchmark excluded women who were not dependent upon men, but who did support dependants.⁷⁹ This stood in direct contrast with the fair wages resolutions that were designed to improve the wages of the predominantly male workers employed by firms that received government contracts. In these jobs, fair wages were considered living wages for male workers who supported a dependent wife and children.⁸⁰ Another disparity that existed between men and women workers dealt with minimum wage requirements. When minimum wages were extended to men workers they were higher than those required to be paid to women workers.⁸¹

By the mid-1960s, however, the minimum standards legislation did apply equally to both men and women. Despite the fact that this legislation was gender neutral, it maintained its secondary, subordinate, and feminized character. Currently, every jurisdiction in Canada has comprehensive employment-standards legislation that provides a range of statutory entitlements. However, these standards are low, riddled with exemptions, and ineffectively enforced.⁸² The prevailing assumption is that collective bargaining legislation is the primary, and preferred, mechanism for regulating the terms and conditions of labour and that employment standards legislation is simply an

77 J. O'Grady, "Beyond the Wagner Act, What Then?" in D. Drache, ed., *Getting on Track: Social Democratic Strategies for Ontario* (Montreal and Kingston: McGill-Queen's University Press, 1992) 153.

78 Fudge, *Labour Law's Little Sister*, *supra* note 1.

79 M. McCallum, "Keeping Women in their Place: The Minimum Wage in Canada, 1910-1925" (1986) 17 *Labour/Le Travail* 29; M.H. Hobbs, 'Dead Horses' and 'Muffled Voices': *Protective Legislation, Education and the Minimum Wage for Women in Ontario* (M.A. Thesis, University of Toronto, 1985); R. Russell, "A Fair or Minimum Wage? Women Workers, the State, and the Origins of Wage Regulation in Western Canada" (1991) 28 *Labour/Le Travail* 59; Creese, *supra* note 10.

80 Russell, *supra* note 79.

81 Creese, *supra* note 10; Ursel, *supra* note 11 at 247.

82 Fudge, *Labour Law's Little Sister*, *supra* note 1; Employment Standards Work Group, "The Real Story: An Analysis of the Impact of Bill 49, The *Employment Standards Improvement Act*, upon Unorganized Workers" brief submitted to the Ontario Government, 19 August 1996.

adjunct to that process. Employment standards legislation continues to be seen as labour law's little sister.

The institutions of labour law are organized as a ladder. They are also profoundly gendered. Collective bargaining law sits at the top, limiting competition and providing the best benefits for those workers lucky enough to be employed in standard jobs either by large private sector employers in the resource extraction, transportation, and manufacturing sector or in the public sector. Employment standards legislation sits at the bottom rung, only blunting the worst excesses of unrestrained labour market competition. Pay equity rests somewhere in between. The experience of pay equity legislation in Ontario clearly demonstrates that its benefits are distributed unequally amongst women workers.⁸³ Those women who are fortunate to be unionized have been able to make some gains. But, for the majority of women who work in small firms, have non-union jobs, or who perform non-standard employment, the promise of pay equity has been illusory.

V. EQUALITY IN A POLARIZED LABOUR MARKET

Equality of opportunity for women who have historically been denied access to good jobs is an important goal. However, a preoccupation with equalizing employment opportunities at the same time as the labour market is deteriorating does nothing to resolve the underlying distributional problem.⁸⁴ Put simply, the majority of jobs being created today are bad jobs. At best, pay and employment equity will intensify the polarization of the labour market for women and other equity-seekers.⁸⁵ Women, aboriginals, disabled persons, and members of visible minorities who are fortunate enough either to be employed in the public sector or large firms may well benefit from pay and employment equity. But the extent they will be able to do so depends upon a range of factors beyond their control; viz, whether they are employed in precarious jobs, in unionized workplaces, or by large firms. For the majority of workers who are entering the current labour market, equality of opportunity simply means the opportunity to work at jobs that are hard to unionize, pay little, and provide even less in the way of benefits.

Our norms of labour law and the standard worker no longer meet the reality of a restructured labour market. Women's labour market participation rate is approaching men's.⁸⁶ The conventional understanding that men work

⁸³ A. McColgan, "Legislating Equal Pay? Lessons from Canada" (1993) 22 *Indust. L.J.* 269; Fudge, "Fragmentation and Feminization", *supra* note 1 at 76.

⁸⁴ J. Acker, "Class, Gender and the Relations of Distribution" (1988) 13 *Signs* 473.

⁸⁵ Fudge, "Fragmentation and Feminization", *supra* note 1 at 82.

⁸⁶ Armstrong, *supra* note 4; Fudge, "Fragmentation and Feminization", *supra* note 1.

for wages that are adequate to support dependent wives and children is undermined as households increasingly rely on two wage-earners to maintain the standard of living that they became accustomed to in the 1970s.⁸⁷ Moreover, it is likely that with the growth in non-standard forms of employment more men will be performing jobs that have historically been associated with women.⁸⁸ Inter-generational labour market inequality is growing.⁸⁹ There are strains increasing on the existing institutional arrangements for regulating employment and the hegemonic paradigm with which it is associated. Rather than responding with nostalgia for the past, it is essential to treat this period of instability as an opportunity to reconceive labour law policy and trade union strategy.⁹⁰

In order to curb the competition that is increasingly polarizing the labour market into good and bad jobs, we need to topple the labour law hierarchy. Collective bargaining should not be the exclusive preserve of workers at the top of the labour market. Inclusive forms of collective representation that counteract the fragmentation in the labour market need to be developed. This requires both legislative change and a reorientation of labour boards' policies and practices with respect to determining appropriate bargaining units. As competition in the labour market increases, legislation and administrative policies that confine collective bargaining to the level of the individual employer and workplace do not serve the increasing number of workers, many of whom are adult women workers and young workers of both sexes who fall outside the norms of Canadian collective bargaining units. Although there are many details of design and administration still to

87 G. York, "Family Life: Not Enough Money, Too Much Stress" *The [Toronto] Globe and Mail* (3 January 1992) A1, A5. It is clear that the increased labour market participation of women in families has preserved many families from experiencing a drop in their standard of living. Between 1973 and 1986, there was a 5 per cent decline in the contribution of the husband to family earnings, and a whopping 46 per cent increase from other members: The Economic Council of Canada, *Legacies: 26th Annual Review, 1989* (Ottawa: Minister of Supply and Services, 1989) at 26. Moreover, the younger the family, the more crucial the earnings of the wife was to the family avoiding poverty: Canadian Advisory Council on the Status of Women, *110 Canadian Statistic on Work & Family* (Background Paper) by D.S. Lero & K.L. Johnson, (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 13.

88 A recent Statistics Canada Study concluded that times were tougher for working men in the 1980s than they were during the Great Depression of the 1930s: J. Ferguson, "Pay For Men Has Dropped, StatsCan Says" *Toronto Star* (30 March 1994) C3.

89 C. Pal, "Intergenerational Inequity in the Canadian Labour Market" (Paper prepared for the Precarious Employment Project, Centre for Research on Work and Society, York University, 1996) [unpublished].

90 J. O'Grady, "Downhill all the Way: The Labour Movement, Wage Polarization and the *Wagner Act* Model of Collective Bargaining" (Paper presented to the Centre for Research on Work and Society Conference on Broadening Bargaining Structures in the New Social Order, York University, 1992).

be ironed out, a number of broader-based bargaining models have been suggested.⁹¹ As well, inclusive organizational strategies must be developed in tandem with a reconceived employment standards policy designed to provide all workers, no matter where they work, with a decent standard of living and the flexibility to meet the exigencies of life.⁹²

But the problem of legislative design is secondary; the primary problem is the lack of political will to regulate the labour market in a way that minimizes competition and exploitation at the bottom. Employers oppose these forms of regulation, and Canadian governments have historically resisted legislation that is designed to limit competition in the labour market. But such reactions to workers' attempts to curb competition in the labour market are not new and they have been challenged, sometimes successfully. The question is whether the labour movement will embrace a political vision that challenges the subordination and inequality inscribed in the status quo. Central to this political vision must be a determination to eradicate gendered inequalities in the home and the workplace. Labour law is simply part of this challenge. Labour laws that are designed to promote solidarity amongst workers, rather than to reinforce and replicate existing lines of fragmentation, will help improve the situation of those workers crowded at the bottom of the labour market—where women are disproportionately found.

⁹¹ B. Cameron, "From Segmentation to Solidarity: A New Framework for Labour Market Regulation" in D. Drache & A. Ranachan, eds., *Warm Heart, Cold Country: Fiscal and Social Policy Reform in Canada* (Ottawa: Caledon Institute, 1995) 193, which reviews much of the recent work on inclusive forms of union representation and collective bargaining. See, also, Ontario District Council of the International Ladies' Garment Workers' Union and INTERCEDE, *Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* by J. Fudge & J. Borowy (Toronto: INTERCEDE, 1993).

⁹² Fudge, *Labour Law's Little Sister*, *supra* note 1. For a thorough analysis of the Saskatchewan government's recent, but ultimately limited, attempt to improve the conditions of part-time workers see D. Broad & D. MacNeil, *A Matter of Control: Saskatchewan Labour Standards and Part-time Work*, SARU Occasional Papers, No. 5. Social Administration Research Unit, Faculty of Social Work, University of Regina, 1995.